TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 88

NATHAN D. LEIMAN AND SAMUEL MARION,
PETITIONERS,

vs.

ALEXANDER GUTTMAN, GEORGE GELLER AND
ARTHUR BAINTON, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF NEW YORK

PETITION FOR CERTIORARI FILED JUNE 10, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1948.

—7203

[fol. 1]

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

NATHAN D. LEIMAN and SAMUEL MARION, Plaintiffs,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, individually and as officers and members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation; Howard S. Guttman, Monroe Guttman, Rudolph Guttman, Irene Guttman, Elizabeth Wolfers and Allen H. Berkman, Defendants.

NOTICE OF APPEAL—April 11, 1947

SIR:

Please take notice that the above-named defendants, except the defendant Berkman, hereby appeal to the Appellate Division of the Supreme Court, First Judicial Department, from an order entered in the above entitled action in the office of the clerk of the County of New York, on the 7th day of April, 1947, denying defendants' motion to dismiss the amended complaint on the ground that this Court [fol. 2] has no jurisdiction of the subject matter of the action, and from each and every part of said order.

Dated: New York, April 11th, 1947.

Yours, etc., Leo Praeger, Attorney for Defendants, Alexander Guttman, George Geller, Arthur Bainton, Howard S. Guttman, Monroe Guttman, Rudolph Guttman, Irene Guttman and Elizabeth Wolfers, Office & P. O. Address, 401 Broadway, Borough of Manhattan, City of New York.

To: Morris Berkeley, Esq., Attorney for Plaintiffs, 291 Broadway, New York City.

[fol. 3] NEW YORK SUPREME COURT, COUNTY OF NEW YORK

Special Term—Part III

Index No. 2773—1947

NATHAN D. LEIMAN and ano., Plaintiffs,

against

ALEXANDER GUTTMAN, etc., et al., Defendants

ORDER APPEALED FROM—April 7, 1947

Present: Hon. Louis A. Valente, Justice.

The following papers numbered 1 to 8 read on this motion, argued—decision reserved this 26th day of March, 1947.

Calendar No. 4420.

	Papers Numbered
Notice of Motion and Amended Summons & Amended Complaint Annexed	1-4
Answering Affidavits & Exhibits	5-7
Replying Affidavits	8

Upon the foregoing papers this motion for judgment dismissing the amended complaint is denied with leave to answer within ten days from the service of a copy of this [fol. 4] order with notice of entry (see memorandum filed herewith).

Opinion filed herewith.

Dated April 7, 1947.

Enter.

L. A. V., J. S. C.

Filed April 7, 1947. New York County Clerk's Office.

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

[Same title]

NOTICE OF MOTION—March 20, 1947

SIRS:

Please take notice that upon the summons and amended complaint in this action and the affidavit of Alexander Guttman, verified the 20th day of March, 1947, the undersigned will move this Court at a Special Term, Part III thereof, to be held in and for the County of New York, at the County Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, on the 26th day of March, 1947, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a judgment dismissing plaintiffs' amended complaint, pursuant to Rule 107 of the Rules of Civil Practice, Section 2 thereof, on the ground [fol. 5] that the Court has not jurisdiction of the subject matter of the action, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, March 20, 1947.

Yours, etc., Leo Praeger, Attorney for Defendants, Alexander Guttman, George Geller, Arthur Bamton, Howard S. Guttman, Monroe Guttman, Rudolph Guttman, Irene Guttman and Elizabeth Wolfers, Office & P. O. Address, 401 Broadway, New York City.

To: Morris Berkeley, Esqs., Attorney for Plaintiffs, 291 Broadway, New York City.

[fol. 6] SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

AFFIDAVIT OF ALEXANDER GUTTMAN, READ IN SUPPORT OF MOTION TO DISMISS COMPLAINT—March 20, 1947

STATE OF NEW YORK,
County of New York, ss:

Alexander Guttman, being duly sworn, says:

I am a defendant in the above entitled action and am fully familiar with all the facts and circumstances therein.

This action was commenced upon an alleged contract made by and between your deponent, as Chairman of Protective Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation, and Nathan D. Leiman, Samuel Marion and Allen H. Berkman, as Counsel for said Committee.

The plaintiffs and defendant Berkman were employed to act for the Committee and to protect the interest of the Committee for Preferred Stockholders in a proceeding pending in the United States District Court for the Western District of Pennsylvania, under Chapter 10 of the Bankruptcy Act, entitled: No. 20716, In Bankruptcy, In the Matter or Pittsburgh Terminal Coal Corporation, Debtor. Proceedings for Reorganization of a Corporation under Chapter X of the Bankruptcy Act, and to generally protect [fol. 7] the rights and interest of the preferred stockholders in the affairs of Pittsburgh Terminal Coal Corporation.

On or about November 20, 1940 I retained plaintiff, Nathan D. Leiman, to represent the Committee for Preferred Stockholders. On or about April 3, 1941 Samuel Marion, plaintiff, was retained to represent the Committee. On or about April 16, 1941 Allen H. Berkman, one of the defendants herein, a Pennsylvania attorney, was retained by plaintiffs Marion and Leiman, with my consent as Chairman of the Preferred Stockholders Committee. At that time it was the understanding between the attorneys and myself that all services were to be paid for upon a contingent basis, depending upon the outcome of their efforts involving the affairs of the Pittsburgh Terminal Coal Corporation and that they would seek their compensation from the debtor estate.

Some time thereafter I was informed by Mr. Marion that the possibilities of receiving compensation from the debtor estate were rather slim and that he, Marion, would withdraw from the case unless some arrangements were made by the preferred stockholders to compensate him and his colleagues. I was in the unenviable position of submitting to Mr. Marion's demands or else retracing my steps in endeavoring to employ new counsel. Prior to Mr. Marion's demand; I, acting for the Committee, had informed the preferred stockholders of Pittsburgh Terminal Coal Corporation that if they, the preferred stockholders, joined the Committee for the purpose of uncovering mismanagement and malfeasance in the affairs of Pittsburgh Terminal Coal Corporation, they, the preferred stockholders, would be [fol. 8] incurring no obligation or liability of any kind, as Counsel had agreed to prosecute the preferred stockholders' claims upon a contingent basis. I, faced with the unhappy choice before me, succeeded in inducing members of my family and close associates to put into escrow five hundred and eighty-four shares of the preferred stock of Pittsburgh Terminal Coal Corporation for additional compensation to Counsel upon completion of the reorganization proceedings in the District Court for the Western District of Pennsylvania. Thereupon such shares were delivered in escrow to the Committee, and Counsel proceeded to discharge their duties to a certain extent and at the time set for petitioning the District Court for allowances, did petition the District Court for the Western District of Pennsylvania for an allowance in the sum of One Hundred and Twenty-Five Thousand ($125,000.00) Dollars, calling the Court's attention to the fact that I had disavowed my intent to live up to the alleged contract to deliver the stock held in escrow and asking the District Court to allow them the sum set forth in their petition. Mr. Justice Gibson, in the District Court for the Western District of Pennsylvania, allowed the plaintiffs and defendant Berkman the sum of $37,500.00 in addition to their expenses and I think fairly assumed that the agreement for additional compensation to the claimants had been set aside and was warranted by the statements in their own petition for an allowance, from which it was conceivably inferable that the claimants no longer expected compensation thereunder, but were looking to the estate for their entire allowance. The Securities and

[fol. 9] Exchange Commission submitted a brief to the District Court, wherein they stated:

> "The recommendation of the Securities and Exchange Commission for an allowance of $40,000.00 and expenses was based on the same assumption."

The assumption being that petitioners, plaintiffs in this action, together with defendant Berkman in this action, were seeking their compensation entirely from the estate. In a statement to the District Court on October 3, 1945, Counsel for the Securities and Exchange Commission, made this statement:

> "Our recommendation is based upon the assumption that the applicants will receive no further compensation for their compensable services."

It is my understanding that plaintiffs now claim the shares of stock deposited in escrow to compensate them for their non-compensable services and I wish to call this Court's attention to the fact that I have been advised by Counsel that pursuant to the provisions of Section 221(4) of the Bankruptcy Act (all compensation payable in a proceeding under Chapter 10 must be fully disclosed to the Judge and if fixed after confirmation of the plan of reorganization must be subject to the approval of the Judge.

I have been advised by Counsel that the statutes, together with its legislative history and cases decided thereunder, make it clear that all allowances for fees from any source whatsoever, must be subject to the approval and discretion of the District Court Judge who has the Chapter [fol. 10] 10 proceeding before him. It is for these reasons I contend that if plaintiffs have a claim upon me, other members of the Preferred Stockholders Committee or Preferred Stockholders, that their recourse, if any, would be a petition for further allowance for non-compensable services to the District Court which had jurisdiction over the entire reorganization proceeding. The Securities and Exchange Commission has constantly urged this position and I have been informed by Counsel that the leading cases on the subject, decided by the United State Supreme Court, give weight to this contention.

In addition to this Action, Allen H. Berkman, a defendant herein, has commenced an action, as plaintiff, in the Court

of Common Pleas of Allegheny County, Pennsylvania, for substantially the same relief sought by the plaintiffs in this action and I have moved through Counsel to dismiss the Pennsylvania action on substantially the same grounds set forth herein.

I respectfully urge that this Court decline to accept jurisdiction of the subject matter which is the basis of plaintiffs' complaint in that the redress of plaintiff's grievance, if any, properly belongs within the jurisdiction of the reorganization Court.

Alexander Guttman.

(Sworn to March 20, 1947.)

[fol. 11] Supreme Court of the State of New York

County of New York

Plaintiffs Designate New York County as Place of Trial.

Amended Summons, Read in Support of Motion to Dismiss Complaint—February 20, 1947

To the Above Named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty (20) days after the service of this summons, exclusive of the day of service. In case of your failure to appear by answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, N. Y., February 20, 1947.

Morris Berkeley, Attorney for Plaintiffs. Office and P. O. Address, 291 Broadway, Borough of Manhattan, City of New York.

[fol. 12] SUPREME COURT OF THE STATE OF NEW YORK

County of New York

AMENDED COMPLAINT, READ IN SUPPORT OF MOTION

Plaintiffs, for their amended complaint, respectfully show and allege:

First. That the plaintiffs Nathan D. Leiman and Samuel Marion were at all the times hereinafter mentioned attorneys and counselors-at-law, practicing their profession as such in the Borough of Manhattan, City, County and State of New York; that the defendant Allen H. Berkman, at all the times hereinafter mentioned was and now is an attorney and counselor-at-law practicing his profession as such in Pittsburgh, Pennsylvania.

Second. That at the times hereinafter mentioned, proceedings for the reorganization of Pittsburgh Terminal Coal Corporation, under Chapter X of the Bankruptcy Act, were pending in the United States District Court for the Western District of Pennsylvania.

Third. That defendant Alexander Guttman at all the times herein mentioned, was and now is Chairman, defendant Arthur Bainton was and now is Secretary, and defendant George Geller was and now is a member of the Committee of Preferred Stockholders of said Pittsburgh Terminal Coal Corporation, and said Committee participated in said reorganization proceedings.

Fourth. That on or about April 3, 1941, the defendants, [fol. 13] except defendant Allen H. Berkman, retained plaintiffs to represent them in the said reorganization proceedings and to file in their behalf proofs on amended proofs of claim against the said Pittsburgh Terminal Coal Corporation for certain monies alleged to be due on preferred stock certificates under the sinking fund provisions relating thereto, and for other services in connection with the said reorganization proceedings, and agreed to pay to plaintiffs for their fee and disbursements therein, in addition to any sum allowed by the court, twenty (20%) percent of the stockholdings of the defendants and agreed to deposit with the defendant Alexander Guttman, Chairman of the Preferred Stockholders Committee, in escrow, 20% of their stockholdings, to be held by the said Alexander Guttman,

Chairman of said committee, until the completion of the said proceedings, at which time such stock would be delivered to plaintiffs.

Fifth. Thereafter, with the permission, consent and approval of the defendants, plaintiffs retained defendant Allen H. Berkman, an attorney, as their associate in Pittsburgh, in this matter.

Sixth. That thereafter the defendants Monroe Guttman, Irene Guttman, George Geller and Arthur Bainton deposited a total of 584 shares with the said Alexander Guttman, individually and as Chairman of the said Preferred Stockholders Committee, pursuant to an agreement in writing, a copy of which is hereto annexed, marked Exhibit A and made a part hereof.

Seventh. That thereafter and on or about December 23, 1943, plaintiff Nathan D. Leiman for a valuable considera-
[fol. 14] tion, assigned to plaintiff Samuel Marion 97⅓ shares of the preferred stock of the Pittsburgh Terminal Coal Corporation referred to in Exhibit A.

Eighth. That all proceedings in said reorganization have been substantially completed, but said defendants except defendant Allen H. Berkman, have failed and refused to turn over said 584 shares of preferred stock of Pittsburgh Terminal Coal Corporation, or any portion thereof, to the plaintiffs, although duly demanded, and said defendants have announced their refusal to abide by said agreement.

Ninth. Allen H. Berkman is made a party defendant herein because his consent to join as a plaintiff cannot be obtained, and his rights in and to said shares of stock and any moneys flowing therefrom, should be determined in this action.

Wherefore, plaintiffs demand judgment as follows:

(1) Against the defendants Alexander Guttman, George Geller and Arthur Bainton, individually and as officers and members of the Preferred Stockholders Committee directing them to forthwith assign and deliver to the plaintiffs 584 shares of the preferred stock of Pittsburgh Terminal Coal Corporation deposited with them in escrow as heretofore alleged; together with all dividends previously declared on said stock and all rights included thereunder.

(2) That the Court determine the rights of the said Allen H. Berkman in and to the said shares of stock and any moneys flowing therefrom.

[fol. 15] (3) That the plaintiffs have such other, further and different relief against the defendants as may be just and proper together with the costs of this action.

Morris Berkeley, Attorney for Plaintiffs, Office & P. O. Address, 291 Broadway, Borough of Manhattan, City of New York.

(Verified by Nathan D. Leiman, one of the plaintiffs, on February 21, 1947.)

EXHIBIT A, ANNEXED TO AMENDED COMPLAINT

To Nathan D. Leiman, Esq., Samuel Marion, Esq., Allen H. Berkman, Esq.:

DEAR SIRS:

This Committee holds 584 shares of Pittsburgh Terminal Coal Corporation Preferred stock obtained from the following individuals:

Monroe Guttmann	200 shares
Irene Guttmann	200 shares
George Geller	134 shares
Arthur Bainton	50 shares
Total	584 shares

These shares are held in escrow by this Committee pending the termination of all proceedings in the matter of the [fol. 16] Pittsburgh Terminal Coal Corporation.

This Committee has secured these shares from the stockholders listed above for the purpose of affording to you additional compensation for your services in the above matter. They have been obtained and are held in escrow on the condition that they be delivered to you only at such time as the reorganization proceedings in the matter of Pittsburgh Terminal Coal Corporation are finally terminated and a final settlement of all suits and claims made by this Committee in behalf of the preferred stockholders have been settled. It is further conditioned upon faithful and satisfactory per-

formance of your duties as counsel to this Committee until the termination of all proceedings.

The five hundred and eighty four (584) shares of aforementioned shares will be distributed as follows:

To Nathan D. Leiman	292 shares
To Samuel Marion	146 shares
To Allen H. Berkman	146 shares
Total	584

Very truly yours, —— ——.

AG:M.

[fol. 17] SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

ANSWERING AFFIDAVIT OF SAMUEL MARION, READ IN OPPOSITION TO MOTION TO DISMISS COMPLAINT

[Matters Underscored Are so in Original Copy Now on File]

STATE OF NEW YORK,
County of New York, ss:

Samuel Marion, being duly sworn, deposes and says: I am one of the plaintiffs herein. Most of the statements contained in the moving affidavit relate to the merits of the litigation and are wholly immaterial to a proper consideration of the issues raised by the motion. All of the said matters have previously been heard at length by Honorable R. M. Gibson, U. S. District Judge for the Western District of Pennsylvania in the Matter of Pittsburgh Terminal Coal Corporation, Debtor. For that reason, no detailed reply thereto will be made and it is requested that the failure to specifically deny any of said allegations shall not be deemed an admission of the truth thereof.

The moving affidavit of Mr. Guttman states that Judge Gibson in fixing the allowance to the plaintiffs and defendant Berkman in said reorganization proceedings at $37,500,

> "fairly assumed that the agreement for additional compensation to the claimants (meaning the agreement annexed to the complaint in this action) had been set aside"

and that

> [fol. 18] "it was conceivably inferable that the claimants no longer expected compensation thereunder but were looking to the estate for their entire allowance."

This statement is not in accordance with the facts as the defendant Guttman knows or should know.

When the application for allowance was made on October 3, 1945, there was an extended hearing in open court, at which Mr. Alexander Guttman was present. Counsel for the Securities and Exchange Commission in making the statutory report to the Court on applications for allowance, and referring to the petition of the plaintiffs and defendant Berkman, said in part:

> "There can be no question as we show in further detail, that these applicants contributed to the favorable results finally achieved." (S. M. page 114)
>
> . . . . . .
>
> "it is the Commission's position that for the *compensable services*, that is for the services for which the Court has the power to compensate them, the services which were of benefit to the estate, we recommend a final allowance to these attorneys for the preferred stockholders committee in the sum of $40,000. . . . Our recommendation is based upon the assumption that the applicants will receive no other compensation for the *compensable services*." (Italics added) (S. M. page 119)
>
> . . . . . .
>
> [fol. 19] "To summarize our recommendation to counsel for the Preferred Stockholders, *it is our recommendation to the Court that they be allowed a final allowance of $40,000 for compensable services of benefit conferred upon the estate* and reimbursement of expenses in the total amount of $3847.65 . . . ." (Italics added) (S. M. page 121)

On November 16, 1945, Judge Gibson fixed the allowance to plaintiffs and defendant Berkman at $37,500, and in a

memorandum accompanying the order making the allowance, the following pertinent paragraph appeared:

> "A joint allowance of $37,500.00 will be granted claimants. This is complicated by an agreement with members of the Protective Committee to hold a number of shares of the debtor's stock for the benefit of counsel. Counsel should not have their compensation duplicated, and the present order is made upon the statement that the original agreement with the Protective Committe is set aside. Mr. Marion is allowed $2,364.54, Mr. Berkman $1,044.23, and Mr. Leiman $13.87 for expenses."

On November 26, 1945, an ex-parte order was entered by Judge Gibson amending said memorandum so as to read as follows:

> "A joint allowance of $37,500.00 will be granted claimants, *without prejudice;* however, to any rights which said claimants have in an agreement, whereby certain stockholders deposited 584 shares of debtor's [fol. 20] preferred stock in escrow with the Protective Committee for Preferred Stockholders of Pittsburgh Terminal Coal Corporation, Debtor, as additional compensation to said claimants for their services, as more fully set forth in a letter from Alexander Guttman to said claimants, which letter is referred to on page 34 of claimants' petition for allowances and offered in evidence at the hearing on petitions for allowances held October 3, 1945. Mr. Marion is allowed $2,364.54, Mr. Berkman $1,044.23, and Mr. Leiman $13.87 for expenses."

On January 17, 1946, an application was made by the defendants to vacate said last mentioned order because no notice thereof was given. A hearing thereon was held on January 17, 1946 which resulted in an order entered August 23, 1946 vacating the memorandum and order of November 26, 1945 and directing that on September 10, 1946,

> "* * * the Court will hear testimony as to the scope of the deposit by Preferred Stockholders of the debtor of 584 shares of said preferred stock as additional compensation to Messrs. Samuel Marion, Allen H. Berkman and Nathan L. Leiman * * *".

On September 10, 1946, an extended hearing was held before Judge Gibson at which the plaintiffs, defendant Berkman, and the defendant Alexander Guttman testified at length and submitted documentary proof as to the scope of the deposit by preferred stockholders of stock, under the [fol. 21] agreement annexed to the complaint, and if it was intended to be payment for noncompensable services. Voluminous briefs were submitted by the defendants, plaintiffs and the Securities and Exchange Commission.

On January 22, 1947, Judge Gibson handed down an opinion, a copy of which will be submitted to the Court on the argument of this motion. The Court's attention is particularly directed to the following excerpts from said opinion:

> "Alexander Guttman, chairman of the Preferred Stockholders' Protective Committee, while not denying that claimants had rendered services which could not be charged against the Debtor, and which were rendered at a time when any such compensation from the debtor's estate seemed improbable, asserted that the deposit of stock in escrow was to be effective only in case no considerable award should be made from the debtor's estate. He also contended that of the 584 shares mentioned in the agreement, 146 shares were to be returned to certain of his relatives."
>
> . . . . . .
>
> "The Court has had no difficulty in determining that the claimants rendered services to the preferred stockholders named in the escrow agreement which were not compensable from the fund distributed by order of the court."
>
> . . . . . .
>
> [fol. 22] "That such services to the Preferred Stockholders Committee, at the request of its members, are entitled to a reasonable recompense seems unquestionable if the escrow agreement is to be reasonably interpreted. As to the method of recompense, however, considerable controversy has arisen."
>
> . . . . . .
>
> "The judgment, if any were entered, would be directly against the stockholders. Even if it were admitted that

> the court had jurisdiction to reduce the amount of the fee contract, where such course is practicable, a direct charge against the depositing stockholders, who are disputing the right to recover any amount in view of the uncertainty as to the value of the stock deposited seems to stretch the interpretative powers of the court too far. "Feeling that the court has not jurisdiction to make such a charge against the depositing stockholders, an order will be made in substance repeating the order of this court of November 26, 1943."

and in connection with said opinion, the Court entered an order which provided that the $37,500 allowance granted to the plaintiffs and defendant Berkman,

> "as compensation for services rendered the Estate of the debtor in the reorganization proceeding * * * was without prejudice to such rights as said Marion, Berk- [fol. 23] man and Leiman may have in an agreement (the agreement annexed to the complaint) * * * and the Court further finds that it is without present jurisdiction to determine the value of the additional services rendered * * *".

This effectively disposes of the statement contained in said affidavit as well as the position of the Securities and Exchange Commission. It further is an adjudication on the claim previously asserted in the District Court that the District Court has sole jurisdiction of compensation of counsel.

This action was commenced by the personal service of the summons on certain of the defendants on January 27, 1947. Thereafter and on February 17, 1947, all of the defendants appeared by William M. Kilcullen. Allen H. Berkman, who originally was a plaintiff in this action, instructed your deponent that he did not wish to continue as a plaintiff and after the commencement of this action, instituted an action in the State Courts in Pennsylvania. It was therefore necessary to amend the summons and complaint designating Allen H. Berkman as a defendant rather than a plaintiff. That was the only change in the pleadings.

On February 17, 1947, the time of the defendants to answer was extended to and including ten days after service of the amended complaint.

On February 20, 1947, the said William H. Kilcullen signed a stipulation that the summons and complaint be amended by striking out the name of Allen H. Berkman as a party plaintiff and naming him as a defendant.

[fol. 24] On February 21, 1947, Mr. Kilcullen acknowledged service of the copy of the amended summons and complaint. The time to answer the amended complaint therefore expired on March 3, 1947.

On March 12, 1947, your deponent wrote to defendants' counsel offering to waive the default in pleading and to accept the answer on March 14th, (later orally extended to March 19th), on the understanding that the answer would not be further amended and that the action would be noticed for the April Term. No answer was served, but the present motion was served on March 20th, 1947. The defendants (except Berkman), are now in default in pleading.

All of the defendants except defendant Berkman, reside in the city of New York. The stock involved in this action is located in the city of New York. Judge Gibson of the United States District Court has previously passed upon the defendants' contention that the matter should be determined by the District Court and has referred the parties to the remedies in the State Court. There is no merit in the pending application which, in the opinion of your deponent, is brought merely for purposes of delay.

Wherefore, your deponent respectfully prays that the motion be denied, with costs.

Samuel Marion

(Sworn to March 24, 1947.)

[fol. 25] Opinion and Order Inadvertently Omitted from Record on Appeal

Order

In the District Court of the United States for the Western District of Pennsylvania

In the Matter of Pittsburgh Terminal Coal Corporation, Debtor

(In Proceedings for the Reorganization of a Corporation under the Bankruptcy Act.)

(No. 20716 In Bankruptcy.)

And now, to wit, January 22, 1947, it appearing after due hearing that the allowance of $37,500.00 granted to Samuel Marion, Allen H. Berkman and Nathan D. Leiman by order of this court of November 16, 1945, as compensation for services rendered the estate of the debtor in the reorganization proceedings at No. 20716 in Bankruptcy, was without prejudice to such rights as said Marion, Berkman and Leiman may have in an agreement whereby certain stockholders of said debtor deposited 584 shares of debtor's preferred [fol. 26] stock in escrow with the Preferred Stockholders' Protective Committee of said debtor as additional compensation to said claimants for their services to said stockholders, as more fully appears in a letter from Alexander Guttman to said claimants (which letter is referred to on page 34 of claimants' petition for allowances held Octobe. 3, 1945), and the court further finds that it is without present jurisdiction to determine the value of the additional services rendered to said depositing stockholders by said Marion, Berkman and Leiman and to charge the amount thereof to said stockholders.

(Signed) R. M. Gibson, District Judge.

[fol. 27] OPINION

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In the Matter of PITTSBURGH TERMINAL COAL CORPORATION, Debtor

(In Proceedings for the Reorganization of a Corporation under the Bankruptcy Act.)

(No. 20716 In Bankruptcy.)

GIBSON, District Judge.

The present matter involves the claim of Samuel Marion, Allen H. Berkman and Nathan D. Leiman, attorneys for the Preferred Stockholders' Protective Committee. Their claim is for "additional compensation" under the agreement in a letter signed by Alexander Guttman, chairman of the committee, which declared that 584 shares of preferred stock were held in escrow for the claimants as additional compensation for their services.

On November 16, 1945, the court allowed the claimants $37,500.00 out of the debtor's estate. Their claim for compensation was evidently misconstrued by the court, which qualified the allowance by stating that it "is complicated by an agreement with members of the Protective Committee to hold a number of shares of the debtor's stock for the [fol. 28] benefit of counsel. Counsel should not have their compensation duplicated, and the present order is made upon the statement that the original agreement with the Protective Committee is set aside". That misconception of the claim of counsel for the Preferred Stockholders Committee was perhaps due to the fact that they joined plainly non-compensable services with the compensable in their claim against the debtor's estate. Later the court, upon being satisfied that counsel had not intended to waive additional compensation under the deposit agreement by their claim for compensation from the estate, made an order which held, in part, that the allowance of $37,500.00 was made:

> "without prejudice * * * to any rights which said claimants have in an agreement, whereby certain stockholders deposited 584 shares of debtor's preferred stock in escrow with the Protective Committee for Preferred Stockholders of Pittsburgh Terminal Coal Corporation,

Debtor, as additional compensation to said claimants for their services."

This order, having been made without notice to the reorganized company and the Stockholders Committee, was later vacated as inadvertently made. The Pittsburgh Terminal Coal Corporation and the debtor's Committee, and with them the Securities and Exchange Commission, have contended that in a Chapter X proceeding the court has the duty of determining the reasonableness of all fees, whether compensable fees chargeable to the estate or for those which are non-compensable and which cannot be so charged. The claimants, on the other hand, have contended that the court [fol. 29] is without jurisdiction except as to claims chargeable to the debtor's estate.

These conflicting contentions having been made by the parties in interest, the court ordered that a hearing be had and testimony be introduced in order that the validity and scope of the claims of Messrs. Marion, Berkman and Leiman might be determined. At the hearing on September 10, 1946, the claimants alleged that, in addition to the services rendered by them to the Preferred Stockholders Protective Committee for which compensation had been allowed to the amount of $37,500.00, they had given other considerable legal services to the Preferred stockholders on whose behalf the 584 shares of stock had been deposited in escrow and were entitled to "additional compensation" from them.

Alexander Guttman, chairman of the Preferred Stockholders' Protective Committee, while not denying that claimants had rendered services which could not be charged against the Debtor, and which were rendered at a time when any such compensation from the debtor's estate seemed improbable, asserted that the deposit of stock in escrow was to be effective only in case no considerable award should be made from the debtor's estate. He also contended that of the 584 shares mentioned in the agreement 146 shares were to be returned to certain of his relatives. His counsel puts great stress upon an action brought in behalf of Rita Crepeau, et al., and treats it as though it were the foundation of the Trustee's action against the North American Coal Corporation, et al., which was the source of the ultimate fortunate recovery of the fund for [fol. 30] distribution. As a matter of fact the earliest

efforts of the claimants were hostile to, and not of benefit to the Trustee's action.

The court has had no difficulty in determining that the claimants rendered services to the preferred stockholders named in the escrow agreement which were not compensable from the fund distributed by order of the court. Among such services were those rendered in connection with the sinking fund claims, Guttman's criticism of the Trustee's sales of machinery and his management of the real estate, his rent collections and the repair of the debtor's houses and other property.

That such services to the Preferred Stockholders Committee, at the request of its members, are entitled to a reasonable recompense seems unquestionable if the escrow agreement is to be reasonably interpreted. As to the method of recompense, however, considerable controversy has arisen.

The claimants contend that this court is without jurisdiction to determine the amount. The present counsel for the preferred stockholders who have deposited the stock asserts that the court has power to pass upon the claim, but should deny any recovery to claimants in view of the testimony of Alexander Guttman. The Securities and Exchange Commission, on the other hand, contends that the court not only may pass upon the claim, but has the duty of so doing, and that the testimony entitles claimants to a determination of the amount to which claimants are entitled and to an order awarding that amount to them.

The Securities and Exchange Commission bases its contention upon its interpretation of Section 221-(4) of Chapter X of the Bankruptcy Act, which provides:

[fol. 31] "The judge shall confirm a plan if satisfied that * * *

"all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services, and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judges."

It will be noted that the conditional deposit of the stock in question was made prior to the confirmation of the reorganization plan.

Undoubtedly Section 221-(4) requires the court to scrutinize the proposed plan in respect to all the phases mentioned in it, and to determine whether the payments made or promised are reasonable or whether they tend to vitiate the plan. But nowhere in it is it recited that the court has the duty of both determining that such an amount paid or promised is reasonable and of making an order requiring the payment of such amount even though it cannot be charged to the fund for distribution. Under Chapter X administrative expenses are authorized, and those who have aided in the reorganization are entitled to compensation for their efforts; but they are awarded such compensation by means of an order upon the trustee by the court. If one had promised compensation to his counsel for his services in a reorganization, but his counsel has not aided in the proceeding, Section 221-(4), in the opinion of the court, [fol. 32] furnishes no authority for an order, upon the promisor to pay the counsel the amount promised or what, in the opinion of the court, is the reasonable value of his services. The existence and scope of the promise creates an issue not before the court.

In re Standard Gas & Electric Co., 106 Fed. (2d) 215, (3 Ct.) the court awarded counsel part of the claim, and stated as to the balance:

> "It is clear that much of his work duplicated that of others and was, therefore, not properly compensable out of debtor's estate. This, of course, is not to say that these services were not properly rendered to his clients, but merely that they should be paid by those clients alone."

The court did not undertake to order the payment by the clients.

In Greensfelder v. St. Louis Public Service Company, 114 Fed. (2d) 53, (8 Ct.) the court, after awarding part of the claim, held:

> "In reorganization proceeding under the Bankruptcy Act, the court, in allowing fees, was not concerned with amount of fees, which noteholders commit-

tee or the clients of attorney retained thereby, might be obligated to pay him."

In Zweifel v. Trans-State Oil Co., 99 Fed. (2d) 650, the agreement between the president of the debtor and his counsel was that counsel, in addition to the amount which would be awarded him by the court, should receive the sum of $10,000.00 payable after payment of the creditors as set out in the plan. The lower court held that such agreement was binding on the debtor, and failed to award counsel [fol. 33] any compensation for his services, although finding that his compensable services, had the agreement not been in evidence, were worth a sum less than $10,000.00. The Court of Appeals held:

"We concur with the court below that such agreement was binding on it (the debtor) in this proceeding, and that it had no jurisdiction to determine its validity as an obligation of the debtor; but we think the court erred in declining to allow any compensation to appellants payable out of the assets of the estate. There was no intention on the part of the debtor or its attorneys that the agreed amount of $10,000.00 should be in lieu of any such allowance by the court."

See also, in Re Watco Corporation, 95 Fed. (2d) 249.

As against the foregoing authorities, which reflect the opinion of this court, a quite respectable authority has been cited, and one which requires some courage when a lower court presumes to accept a contrary view.

In McCrory Stores Corporation, 91 Fed. (2d) 947 (2 Ct.) a committee of creditors engaged an attorney, paying him a retainer of $25,000, and agreeing to pay him 10% of any proceeds paid to creditors represented by him. The creditors were paid in full and in addition received interest to amount of 19%. By the agreement the attorney would have received $84,000.00. The District Court, sustained by the Court of Appeals, found that the services were reasonably worth only $35,000.00. The Court of Appeals [fol. 34] stated that the "scrutiny clause" of Section 77-B, (b) (10) (which is embodied in Chapter X, § 212), "authorized him (the District Judge), to restrain the committee from proceeding under the contingent fee agreement after the reorganization petition was filed", 91 Fed. (2d) at 949.

The order of the District Court allowed counsel $10,000, the $25,000 part of the fee having been paid when he was retained. This sum, by the order, was to be paid from an allowance to the creditors theretofore approved.

In respect to the charge to the creditors' allowance, the instant matter differs from the case cited. In the instant case no sufficient fund has been credited to the depositing stockholders against which any allowance to claimants could be charged. The judgment, if any were entered, would be directly against the stockholders. Even if it were admitted that the court has jurisdiction to reduce the amount of the fee contract, where such course is practicable, a direct charge against the depositing stockholders, who are disputing the right to recover any amount, in view of the uncertainty as to the value of the stock deposited seems to stretch the interpretative powers of the court too far.

Feeling that the court has not jurisdiction to make such a charge against the depositing stockholders, an order will be made in substance repeating the order of this court of November 26, 1945.

January 22, 1947.

[fol. 35] SUPREME COURT OF THE STATE OF NEW YORK

County of New York

REPLYING AFFIDAVIT OF ALEXANDER GUTTMAN, READ IN SUPPORT OF MOTION TO DISMISS COMPLAINT

STATE OF NEW YORK,
County of New York, ss.:

Alexander Guttman, being duly sworn, deposes and says:

I am one of the defendants herein and am fully acquainted with all the facts pertaining to this action and am familiar with this motion.

I submit this affidavit in reply to the answering affidavit submitted by the plaintiff, Samual Marion.

I have read the affidavit of Samuel Marion. Nowhere is there contained in his affidavit any statement which tends in anywise to confer jurisdiction of this action upon this Court. At great length Mr. Marion attempts to urge that the agreement made by the defendants with the plaintiffs

contemplated the payment of non-compensable services rendered by the plaintiffs as attorneys in the reorganization proceeding which is still pending in the United States District Court for the Western District of Pennsylvania. I emphatically deny that the defendants ever contemplated paying for any non-compensable services. Such idea on the part of Mr. Marion is completely an after-thought.

However, assuming, without conceding, that Mr. Marion might be entitled to the payment of a fee for non-compensable services rendered in the reorganization proceeding, [fol. 36] this Court would still lack jurisdiction of the subject matter, since all fees must be determined by the Court where the proceeding is pending.

I have been advised by my attorney that that is the law and I refer this Court to the brief submitted by my attorney on this point.

It should be noted by this Court that Mr. Marion in making his application for a fee to the U. S. District Court in the reorganization proceeding, asked for the sum of $125,000.00. In his petition, consisting of over one hundred pages, he detailed all of the services, including those which he now urges are non-compensable services. The Court, after considering the entire petition, awarded Mr. Marion and his associates the sum of $37,500.00.

As a matter of fact Mr. Marion disclosed to the District Court the very agreement upon which this amended complaint is founded and advised the Court that he did not expect to receive any compensation pursuant to that agreement. On page 34 of Mr. Marion's petition he made this very statement:

> "Mr. Guttman has advised your petitioners that he disavows said letter and will refuse to abide by the terms thereof."

Clearly, the plaintiffs are seeking payment once again for services for which they already have been paid and in any event the issue is one without the jurisdiction of this Court.

The motion to dismiss the amended complaint should be granted, as prayed for in the notice of motion.

Alexander Guttman.

(Sworn to March 26, 1947.)

[fol. 37] IN THE SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

OPINION OF MR. JUSTICE VALENTE

(New York Law Journal—April 8, 1947)

Leiman v. Guttman—This motion to dismiss the amended complaint is predicated upon the contention that the federal court, in charge of the reorganization proceeding, possesses exclusive jurisdiction of the subject matter of the action. That very court, however, has held that it does not possess such jurisdiction and it has therefore expressly ordered the allowances granted by it should be "without prejudice to such rights as said Marion, Berkman and Leiman may have in an agreement whereby certain stockholders of said debtor deposited 584 shares of debtor's preferred stock in escrow with the Preferred Stockholders Protective Committee of said debtor as additional compensation to said claimants for their services to said stockholders." The order of the federal court, dated January 22, 1947, concludes with the words "The court further finds that it is without present jurisdiction to determine the value of the additional services rendered to said depositing stockholders by said Marion, Berkman and Leiman, and to charge the amount thereof to said stockholders." The accompanying opinion of the court states that it "has had no difficulty in determining that the claimants rendered services to the preferred stockholders named in the escrow agreement which were not compensable from the fund distributed by order of the court" and "That such services to the Preferred Stockholders Committee at the request of its members, are entitled to a reasonable recompense seems unquestionable if the escrow agreement is to be reasonably interpreted." The opinion indicates clearly that the court up-[fol. 38] held the contention that the allowances made by it were only for compensable services, i. e., those payable out of the debtor's estate, and that the claimants, two of whom are the present plaintiffs, were entitled to additional compensation for non-compensable services from those who retained them, but that the determination of the claim for such non-compensable services was beyond the jurisdiction of the Federal Court in which the reorganization proceeding was pending.

To uphold the contention of the present movants that the federal court was in error and that this court has no jurisdiction of the subject matter of the action would be tantamount to a ruling that although the plaintiffs have a good claim neither the federal court nor this court has jurisdiction. The defendants proper remedy, it would seem, was to appeal from the order of the federal court to the extent that it provided (1) that the allowances therein granted to Marion, Berkman and Lehman were without prejudice to their rights under the escrow agreement to receive additional compensation from the preferred stockholders, and (2) that it was without jurisdiction to pass upon said rights.

The motion for judgment dismissing the amended complaint is denied, with leave to answer within ten days from the service of a copy of this order, with notice of entry. Order signed.

[fols. 39-40] In the Supreme Court of New York, County of New York

Stipulation Waiving Certification

It is hereby stipulated, pursuant to Section 170 of the Civil Practice Act, that the foregoing consists of true and correct copies of the notice of appeal, the order appealed from, the opinion and all the papers upon which the Court below acted in making said order, and the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof pursuant to Section 616 of the Civil Practice Act or otherwise is hereby waived.

Dated the — day of May, 1947.

Leo Praeger, Attorney for Defendants-Appellants.

Morris Berkeley, Attorney for Plaintiffs-Respondents.

[fol. 41] SUPREME COURT, NEW YORK COUNTY

NATHAN D. LEIMAN and SAMUEL MARION, Plaintiffs-Respondents,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, Individually and as officers and members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation; Howard S. Guttman, Monroe Guttman, Rudolph Guttman, Irene Guttman and Elizabeth Wolfers, Defendants-Appellants,

and

ALLEN H. BERKMAN, Defendant

NOTICE OF APPEAL TO THE COURT OF APPEALS—July 21, 1947

SIR:

Please take notice that, pursuant to an order of the Appellate Division, Supreme Court, First Judicial Department, entered in the office of the Clerk of said Appellate Division on the 3rd day of July, 1947, granting defendants-appellants' application for leave to appeal from the Appellate Division to the Court of Appeals, and certifying a certain question to be reviewed by the Court of Appeals, the above named defendants-appellants hereby appeal to the Court of Appeals, from the order of the Appellate Division, First Department, entered in the office of the Clerk of the said Appellate Division, First Department, on the 3rd day of July, 1947, affirming by a divided Court an order of the [fol. 42] Supreme Court entered herein in the office of the Clerk of New York County on the 7th day of April, 1947, which order denied defendants-appellants' motion to dismiss the amended complaint herein, on the ground that this Court has no jurisdiction of the subject matter of the action, and the defendants-appellants hereby appeal from each and every part of said order of affirmance as well as from the whole thereof, and for the review of the following certified question:

"Has the Supreme Court of the State of New York jurisdiction over the subject matter of this action to recover for legal services rendered to the stockholders

committee which are not compensable out of the assets of the Debtor's estate, in a Chapter X reorganization proceeding under the United States Bankruptcy Act?"

Dated New York, July 21, 1947.

Yours, etc., Leo Praeger, Attorney for Defendants-Appellants. Office & P. O. Address, 401 Broadway, Borough of Manhattan, City of New York.

To Clerk of New York County.

To Morris [redacted], Esq., Attorney for Plaintiffs-Respondents, Office & P. O. Address, 291 Broadway, Borough of Manhattan, City of New York.

[fol. 43] IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

NATHAN D. LEIMAN AND SAMUEL MARION,
Plaintiffs-Respondents,

against

ALEXANDER GUTTMAN, GEORGE GELLER AND ARTHUR BAINTON, Individually and as Officers and Members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation; Howard S. Guttman, Monroe Guttman, Rudolph Guttman, Irene Guttman and Elizabeth Wolfers, Defendants-Appellants, and Allen H. Berkman, Defendant.

ORDER OF APPELLATE DIVISION GRANTING LEAVE TO APPEAL TO THE COURT OF APPEALS—July 3, 1947

The above named defendants-appellants having moved for leave to appeal to the Court of Appeals from the order [fol. 44] of this Court entered herein on the 24th day of June 1947,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Leo Praeger, in support of said motion, and the affidavit of Samuel Marion in opposition thereto, and after hearing Mr. Leo Praeger for the motion, and Mr. Samuel Marion opposed, it is hereby

Ordered that the said motion be and the same hereby is granted and this Court hereby certifies that in its opinion

a question of law is involved which ought to be reviewed by the Court of Appeals as follows:

"Has the Supreme Court of the State of New York jurisdiction over the subject matter of this action to recover for legal services rendered to the stockholders committee which are not compensable out of the assets of the Debtor's estate, in a Chapter X reorganization proceeding under the United States Bankruptcy Act?"

Enter.

J. M. C. Justice.

[fol. 45] IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

NATHAN D. LEIMAN, et ano., Plaintiffs-Respondents,

against

ALEXANDER GUTTMAN, et al., Defendants-Appellants.

ORDER OF AFFIRMANCE OF APPELLATE DIVISION, APPEALED FROM—June 24, 1947

An appeal having been taken to this Court by the above-named defendants from an order of the Supreme Court, New York County, entered on the 7th day of April 1947, denying said defendants' motion pursuant to Rule 107, subdivision 2, of the Rules of Civil Practice, to dismiss the amended complaint herein, on the ground that the Court has no jurisdiction of the subject matter of the action, and said appeal having been argued by Mr. Leo Praeger of counsel for the appellants, and by Mr. Samuel Marion of counsel [fol. 46] for the respondents, and due deliberation having been had thereon, it is hereby

Ordered that the order so appealed from be and the same is hereby affirmed with $20 costs and disbursements to the respondents, with leave to the defendants-appellants to answer within ten days after service of a copy of this order with notice of entry thereof, on payment of said costs. (Two of the Justices dissent and vote to reverse and grant the motion to dismiss.

Enter.

D.W.P.

[fol. 47] IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

AFFIDAVIT OF NO OPINION BY APPELLATE DIVISION—September 8, 1947

STATE OF NEW YORK,
County of New York, ss:

Leo Praeger, being duly sworn, deposes and says that he is the attorney for the Defendants-Appellants herein; that he is familiar with all the proceedings had in this action; and that no opinion or memorandum has been rendered by the Court below in this case.

Leo Praeger.

Sworn to before me this 8th day of Sept., 1947. Barney Rosenstein, Attorney & Counsellor-at-Law in the State of New York, Residing in Bronx County. P.O. Address: 401 Broadway, N. Y. 13, N.Y. Bronx Co. Clk's No. 15, Reg. No. A-321-R-9. Certificates Filed in: N. Y. Co. Clk's No. 1083, Reg. No. A-1003-R-9. Commission Expires March 30, 1949.

[fol. 48] IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION—Sept. 30, 1947

It is hereby stipulated, pursuant to Section 170 of the Civil Practice Act, that the foregoing consists of true and correct copies of the notice of appeal to the Court of Appeals, the order of Appellate Division granting leave to appeal to the Court of Appeals, the order of affirmance of Appellate Division appealed from and all the papers upon which the Court below acted in making said order, and the whole thereof, now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Section 616 of the Civil Practice Act or otherwise is hereby waived.

Dated the 30 day of September, 1947.

Leo Praeger, Attorney for Defendants-Appellants.
Morris Berkeley, Attorney for Plaintiffs-Respondents.

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50] Reporter's Certificate to following paper omitted in printing.

[fol. 51] IN THE COURT OF APPEALS OF NEW YORK

NATHAN D. LEIMAN et al., Respondents, v. ALEXANDER GUTTMAN et al., Individually and as Officers and Members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation et al., Appellants, et al., Defendants.

Decided March 11, 1948

Appeal, by permission of the Appellate Division of the Supreme Court in the first judicial department upon a certified question from an order of said court, entered July 3, 1947, which affirmed an order of the Supreme Court at Special Term (Valente, J.), entered in New York County, denying a motion by defendants for a dismissal of the amended complaint upon the ground that the court did not have jurisdiction of the subject matter of the action.

Barney Rosenstein and Leo Praeger for appellants.

George Zolotar, Samuel M. Koenigsberg, Arthur A. Burck, Aaron Levy, Roger S. Foster and Sidney H. Willner for Securities and Exchange Commission, amicus curiae, in support of appellants' position.

Samuel Marion and Morris Berkeley for respondents.

Opinion

Thacher, J. Appeal by permission of the Appellate Division, First Department, upon a certified question from an order of said court which affirmed an order of the Supreme Court at Special Term denying defendants' motion to dismiss the amended complaint on the ground that the court has not jurisdiction of the subject matter of the action. The following question was certified: "Has the Supreme Court of the State of New York jurisdiction over the subject-matter of this action to recover for legal services rendered to the stockholders committee which are not compensable out of the

assets of the Debtor's estate, in a Chapter X reorganization proceeding under the United States Bankruptcy Act?"

The complaint alleges that plaintiffs were retained by the defendants-appellants, who were officers and members of a committee of preferred stockholders of Pittsburgh Terminal Coal Corporation in corporate reorganization proceedings pending in the United States District Court for the Western District of Pennsylvania, In the Matter of Pittsburgh Terminal Coal Corporation, Debtor, to file amended proofs of claim against the debtor for money alleged to be due on preferred stock certificates under the sinking fund provisions relating thereto and to render other services in connection with the reorganization proceedings, for which defendants agreed to pay plaintiffs for their fee and disbursements therein, in addition to any sum allowed by the court, 20% of the stockholdings of the defendants. Stock certificates were to be deposited with the chairman of the committee and delivered to plaintiffs upon the completion of the pro-
[fol. 52] ceedings. It is further alleged that the proceedings in reorganization have been substantially completed, but the defendants-appellants have failed and refused to turn over the shares of preferred stock thus deposited in escrow. Attached to the complaint as Exhibit A is a copy of a letter from the committee advising the plaintiffs of the deposit of the shares with them by four of the preferred stockholders. The document, referring to the shares, states the terms upon which they are held as follows: "They have been obtained and are held in escrow on the condition that they be delivered to you only at such time as the reorganization proceedings in the matter of Pittsburgh Terminal Coal Corporation are finally terminated and a final settlement of all suits and claims made by this Committee in behalf of the preferred stockholders have been settled. It is further conditioned upon faithful and satisfactory performance of your duties as counsel to this Committee until the termination of all proceedings."

There is no allegation in the complaint disclosing the actual services rendered. It does, however, appear that the compensation sought is "in addition to any sum allowed by the court", is "additional compensation for your services in the above matter" and "conditioned upon faithful and satisfactory performance of your duties as counsel to this Committee until the termination of all proceedings." There

is no allegation of performance, but it is alleged "that all proceedings in said reorganization have been substantially completed". Thus it is clear that the claim asserted is for additional compensation for services as counsel to the stockholders' committee. According to the document, counsel are to have the shares as additional compensation, regardless of the value or character of the services rendered.

Jurisdiction of the courts of the United States in all matters and proceedings in bankruptcy is exclusive of the courts of the several States (U. S. Const., art. I, § 8; U. S. Code, tit. 28, § 371, par. [Sixth]). Sections 221, 241, 242 and 243 of the Federal Bankruptcy Act (U. S. Code, tit. 11, §§ 621, 641, 642, 643) impose upon the Federal courts the duty of allowing reimbursement for proper costs and expenses incurred and reasonable compensation for services rendered in corporate reorganization proceedings, and under these provisions the bankruptcy courts have plenary power to review all fees and expenses in connection with the reorganization from whatever source they may be payable (*Woods v. City Nat. Bank & Trust Co.*, 312 U. S. 262, 267). Section 221, having general application in reorganization, provides: "The judge shall confirm a plan if satisfied that—* * * (4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the [fol. 53] plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge". There has been no such scrutiny by the bankruptcy court in this case. Section 241 deals with costs and expenses incurred by the petitioning creditors and reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by referees, special masters, the trustee and other officers, and the attorneys for any of them, the attorney for the debtor and the attorney for the petitioning creditors. Section 242 governs this case; it provides: "The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved

by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

"(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders; * * *

"(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

We think it entirely clear that it was the duty of the bankruptcy court to determine and allow reasonable compensation for the services rendered by plaintiffs as attorneys for the committee of stockholders and to determine, as required by section 221, whether or not the additional compensation promised to be paid to plaintiffs by delivery of shares was reasonable (*Brown* v. *Gerdes*, 321 U. S. 178; *Woods* v. *City Nat. Bank & Trust Co., supra*). This jurisdiction being exclusive, the State courts have no jurisdiction to entertain any suit for compensation in addition to the compensation allowed by the bankruptcy court.

The judge in the bankruptcy court made an order to the effect that an allowance of $37,500, previously granted by his order to plaintiffs and defendant Berkman, who with the approval of the defendants had been retained as counsel, as compensation for legal services, was "without prejudice to such rights as said Marion, Berkman and Leiman may have" in the escrow agreement. (Matter of Pittsburgh Terminal Coal Corp., 69 F. Supp. 656, 659.) It seems clear that the district judge misapprehended the duty imposed upon him by section 221 of the act, which required his determination that all payments made or promised by any person for services or for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization have been fully disclosed and are reason-
[fol. 54] able, or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge.

It is our view, therefore, that the Supreme Court of this State is without jurisdiction to entertain this suit for additional compensation for services rendered to the committee.

The orders should be reversed and the motion granted, with costs in all courts. The question certified should be answered in the negative.

Desmond, J. (dissenting). The complaint in this equity suit contains, after the allegations summarized in Judge

Thacher's opinion, a prayer or judgment requiring defendants to deliver up to plaintiff the stock in question, and for a determination of the rights of defendant Berkman in said stock, also a prayer "that the plaintiffs have such other, further and different relief against the defendants as may be just and proper". The motion for dismissal was made on the sole ground that the Supreme Court of the State of New York has no jurisdiction at all to entertain this suit or to hear the parties or to grant or deny any relief. The majority opinion for reversal here grounds itself on the sweeping holding that since the legal services rendered by plaintiffs to defendants were in a chapter X reorganization, the State courts are totally without power or authority to furnish any relief, no matter what the precedent circumstances, even the most unusual circumstances here disclosed.

I do not doubt that the Federal bankruptcy courts have plenary power to review all fees and expenses in connection with a reorganization, from whatever sources they may be payable, as the Supreme Court said in *Woods v. City Nat. Bank & Trust Co.* (312 U. S. 262, 267). The plain intent of the statute, for reasons easy to discover (see 1 Collier on Bankruptcy [14th ed.], § 11.09), is that fee arrangements for services in chapter X proceedings, are to have the scrutiny and approval or disapproval of the Federal district courts sitting in bankruptcy. These plaintiffs, doing what they could to comply with the spirit and intent of that statute, made frank and full disclosure to the bankruptcy court of the agreement sued upon here. The district judge examined that contract and, in his opinion of January 22, 1947, made these statements which can be treated as findings of fact (Matter of Pittsburgh Terminal Coal Corp., 69 F. Supp. 656, 657-658):

"The court has had no difficulty in determining that the claimants rendered services to the preferred stockholders named in the escrow agreement which were not compensable from the fund distributed by order of the court. Among such services were those rendered in connection with the [fol. 55] sinking fund claims, Guttman's criticism of the Trustee's sales of machinery and his management of the real estate, his rent collections and the repair of the debtor's houses and other property.

"That such services to the Preferred Stockholders Committee, at the request of its members, are entitled to a reasonable recompense seems unquestionable if the escrow

agreement is to be reasonably interpreted. As to the method of recompense, however, considerable controversy has arisen."

After having made those findings to the effect that extra compensation in some amount was due, and having, inferentially, found that the payment thereof would not be inconsistent with the approved reorganization plan or otherwise illegal, the district judge—mistakenly, it seems—went on to hold (pp. 659-660) that he was "without present jurisdiction to determine the value of the additional services" or to "charge the amount thereof to said stockholders."

Regardless of the Federal judge's erroneous views as to his own powers, the events above related show, I think, that the full purpose of the Federal statute was accomplished, at least under these special circumstances. If we hold that the State courts now have no jurisdiction to grant any relief at all to plaintiffs, on the breach by defendants of the fee agreement on which the Federal judge held that something was due, we are depriving these plaintiffs of their day in court. Since such is not a necessary construction of the Bankruptcy Act provisions, I prefer to hold that the State courts are not totally without jurisdiction.

On a proper trial the State Supreme Court may construe any doubtful terms of the agreement sued on, may pass on any defense of its invalidity on any asserted ground, and any controversy as to the amount due. Assumption by the State court of jurisdiction of the subject matter, to that extent, will not violate the letter or spirit of the Federal law.

The order should be affirmed, with costs and the certified question answered in the affirmative.

Loughran, Ch. J., Lewis and Fuld, JJ., concur with Thacher, J.; Desmond, J. dissents in opinion in which Conway and Dye, JJ., concur.

Orders reversed, etc.

[fol. 56] IN THE COURT OF APPEALS

REMITTITUR—March 12, 1948

[fol. 57] NATHAN D. LEIMAN and ano, Respondents,

vs.

ALEXANDER GUTTMAN & ors. etc., Appellants,

and

ALLEN H. BERKMAN, Defendant

Be it remembered That on the 4th day of October in the year of our Lord one thousand nine hundred and forty-seven, Alexander Guttman & ors. etc., the appellants in this cause came here unto the Court of Appeals by Leo Praeger, their attorney, and filed in said court a notice of appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Nathan D. Leiman and ano, the respondents in said cause, afterwards appeared in the said Court of Appeals by Morris Berkeley, their attorney.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Barney Rosenstein, of counsel for the appellants, and by Mr. Samuel Marion, of counsel for the respondents, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the orders herein be and the same are hereby reversed and motion granted with costs in all courts. Question certified answered in the negative.

[fol. 58] And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said orders be reversed and motion granted with costs in all courts. Question certified answered in the negative as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises are by the said Court of Appeals remitted unto the Appellate Division of the Supreme Court, First Judicial Department, before the

justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the justices thereof etc.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 59] In the Appellate Division of the Supreme Court of New York

Nathan D. Leiman and Samuel Marion, Plaintiffs-Respondents,

against

Alexander Guttman, George Geller and Arthur Bainton, individually and as officers and members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation; Howard S. Guttman, Monroe Guttman, Rudolph Guttman, Irene Guttman and Elizabeth Wolfers, Defendants-Appellants,

and

Allen H. Berkman, Defendant

Judgment of Remittitur—March 25, 1948

The above named defendants-appellants having appealed to the Court of Appeals of the State of New York from the order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, made on the 24th day of June 1947, affirming the order in favor of the plaintiff and against the defendant, heretofore entered in the office of the clerk made on April 7, 1947 in the Supreme Court, New York County, denying defendants' motion pursuant to Rule 107, subdivision 2 of the Rules of Civil Practice, to dismiss the amended complaint on the ground that the court [fol. 60] has no jurisdiction of the subject matter of the action, and the Appellate Division, First Department, by order dated July 3, 1947 having certified to the Court of

Appeals a question of law for its determination, and the said appeal having been argued at the said Court of Appeals, and after deliberation the Court of Appeals having ordered and adjudged that the said orders herein be reversed and the motion granted with costs in all courts, and having further ordered that the question certified be answered in the negative, and having further ordered and adjudged that the record aforesaid and the proceedings be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law;

Now on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of Leo Praeger, attorney for the defendants-appellants herein, it is hereby

Ordered that the order and judgment of the said Court of Appeals be and the same hereby are made the order and judgment of this court.

Enter

D. W. P., Justice.

[fol. 61] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.